Supreme Court, U.S.
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No. 92-152

In The

Supreme Court of the United States

October Term, 1992

DR. FRANK P. KOSIK,

Petitioner,

v.

CLOUD COUNTY COMMUNITY COLLEGE,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner, who received and responded to no less than nine reasons for the non-renewal of his employment contract, is entitled to greater "pre-termination" due process protections than those enumerated by the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

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STATEMENT OF THE CASE[1]

This action arises out of the nonrenewal of Petitioner's one-year contract to serve as the director of the Learning Resource Center ("LRC") at Cloud County Community College ("CCCC"), the Respondent. Petitioner's employment history with CCCC was marked by adverse commentary. Portions of Petitioner's employment history are cited in the opinion of the Kansas Supreme Court as follows:

> Dr. Kosik was formally evaluated by the Dean of Instruction, Dr. James Douglass, on August 28, 1986. Dr. Douglass acknowledged Dr. Kosik's expertise 'in the library and in all technical phases.' Dr. Douglass, however, went on to state:
>
> > Explanation: *Even though I recommended contract in June, the board was hesitant and your renewal was on a split vote. Obviously they were responding to a collection of adverse comments over a period of time.* Hopefully, comments are beginning to be favorable.
>
> In April 1987, *80 of the 600 students at CCCC signed a petition calling for a review of the appointment of Dr. Kosik* to his position of director of the LRC. At the April 20, 1987 meeting of the CCCC Board of Trustees (Board), it was recommended that the administrative staff holding administrative and administrative support contracts be reappointed with the exception of Dr. Kosik.

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[1] Respondent adopts and incorporates the Statement of Facts compiled by the Kansas Supreme Court. *See* Petition for Writ of Certiorari, App. 2-8, 13-16. Respondent restates the salient facts above for the convenience of the Court.

> *There followed a motion to develop and present to Dr. Kosik a list of directives for changes in his conduct. The next day Dr. Kosik received the list issued by the Board, which Dr. Kosik signed.*

Petition for Writ of Certiorari, App. 3. (Emphasis added.)

Following repeated complaints from faculty and administrative personnel concerning Petitioner's performance, CCCC's Board of Trustees eventually voted not to renew Petitioner's contract for the 1989-90 academic year. As Petitioner notes, the Board sent Petitioner formal notice of nonrenewal on May 15, 1989. This notice was sent in accordance with the College's administrative personnel policies which required that written notice would be sent to the administrator.[2] The Board's policies did not require that an explanation of the reasons for nonrenewal be provided concurrently with the notice; the policies required the Board to specify its reasons at a meeting which could be called at the election of the administrator. Petitioner timely requested a meeting with the Board which was subsequently set to take place on June 6, 1989.

Petitioner received nine reasons for the Board's action; these reasons were given to the Petitioner both orally and in writing. In his Statement of the Case, Petitioner suggests that he received the "vague and ambiguous" reasons for the nonrenewal of his contract "for the

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[2] Policy AP 6 of the Administrative Personnel Policies of the Board of Trustees of CCCC is set out verbatim in Petitioner's Statement of the Case at p. 8. This Policy is modeled after the state's Administrators' Act, K.S.A. 1991 Supp. § 72-5452, and K.S.A. § 72-5453, cited verbatim by the Kansas Supreme Court in its analysis. *See* Petition for Writ of Certiorari, App. 11.

first time" at this June 6, 1989 meeting. Petitioner ignores the fact, which was noted by the Kansas Supreme Court in its decision, that he had previously been given a list of directives by the Board which, if not followed, would result in the nonrenewal of his contract. (*See* Plaintiff's Exhibit 4A attached hereto in the Appendix at a-1.) These directives, written almost two years prior to Petitioner's termination, are strikingly similar to the reasons relied upon by the Board in reaching its decision not to renew his contract. (*Cf.* Plaintiff's Exhibit 4A and Plaintiff's Exhibit F, attached hereto in the Appendix at a-1 and a-3.) In fact, Petitioner was not surprised when he received the 1987 directives since he knew that the faculty and staff had voiced complaints about his job performance. (Tr. pp. 490-492, Kosik Testimony.)

Petitioner also disregards the fact that he was allowed to orally address the Board for nearly *one hour* after receiving notice of the reasons for the proposed nonrenewal. (Plaintiff's Exhibit 8; Tr. p. 108, Ihrig Testimony.) Although not required by CCCC's personnel policies, Petitioner was also permitted to have two fellow employees speak on his behalf at the June 6 meeting. (*See* Tr. pp. 560-61, Parker Testimony; Tr. p. 606, Johnson Testimony; Tr. p. 435, Kosik Testimony.) Further, following the meeting with the Board on June 6, Petitioner took up the Board's offer to allow a *written* response. (*See* Plaintiff's Exhibit 13, attached hereto in the Appendix at a-5; Tr. pp. 505-506, Kosik Testimony.) Significantly, in his written response to the reasons for nonrenewal, Petitioner made the following critical concession:

> *"I will not deal with the reasons 1 to 7. They have been amply dealt with by Mrs. Johnson and Mrs. Parker."*

Id. After receiving this written response, and prior to any final decision on the renewal of Petitioner's contract, members of the Board toured the LRC with Petitioner for about 45 minutes. (Plaintiff's Exhibit 9, Tr. pp. 506-507, Kosik Testimony.) It was only after these "opportunities to respond" that the Board made its final decision not to renew Petitioner's contract. (Tr. pp. 349-352, Dreiling Testimony.) Petitioner's response to the Board was also partially effective since the Board later deleted Items 8 and 9 from the list of reasons stated for not renewing the contract. (Tr. pp. 509-510, Kosik Testimony.)

Based upon the testimony of numerous witnesses at trial, the jury found that CCCC had good cause not to renew Petitioner's contract. The Kansas Supreme Court affirmed the jury's verdict in this regard and reversed the trial court's finding that CCCC violated Petitioner's right to due process.

SUMMARY OF THE ARGUMENT

Neither in any evidence cited from the record nor in any legal authorities brought to the Court's attention has Petitioner provided any justification for the board and sweeping "pre-termination" due process rights that he claims in this action. This Court has clearly articulated the due process rights of a government employee who faces termination and the process identified by this Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), has been duly followed by Respondent.

Petitioner's suggestion that the employer's evidence was not explained – as required by *Loudermill* – is factually incorrect since Petitioner was given no less than nine reasons which provided the basis for his impending termination. Petitioner's concomitant suggestion that "the employer's evidence be provided to the employee" stretches far beyond the *Loudermill* requirement of an "explanation of the evidence" and unnecessarily intrudes upon the government's interest in quickly removing an unsatisfactory employee.

Petitioner's contention that the Kansas Supreme Court ignored the *Loudermill* directive in its review of the case is also incorrect. After reciting each of the *Loudermill* requisites, the Kansas Supreme Court analyzed the facts and concluded:

> We hold the procedure adopted by the Board does not violate due process. Dr. Kosik was afforded notice of nonrenewal. *He was provided a list of reasons for nonrenewal* and a hearing before the Board to attempt to refute those reasons orally and in writing. . . .

Therefore, and for the reasons more fully described below, there are no special and important reasons for granting certiorari in this case. There is no unsettled federal question as suggested by Petitioner's "Question Presented," nor is there a decision which conflicts with applicable decisions of this Court. This is simply a case in which a careful review of the evidence reveals that, upon the facts presented, Petitioner's due process rights have been satisfied in a manner commensurate with explicit guidelines established by this Court. The Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING WRIT

I. THE PROCEDURAL DUE PROCESS REQUIREMENTS ENUNCIATED IN *LOUDERMILL* HAVE BEEN MET

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court discussed the due process protections applicable to public employees who possess a property interest in continued employment. The Court stated: "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by a notice and opportunity for hearing appropriate to the nature of the case.' " *Id.* at 542. The Court recognized that due process requires a balancing of competing interests and found that, with respect to public employment, these competing interests include "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." *Id.* at 542-543. The Court concluded by providing the following guidelines:

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Id. at 546. (Citations omitted.)

Petitioner attempts to extrapolate a new requirement from the plain language used in *Loudermill*. Under the rubric of "explanation of the evidence," Petitioner stretches to conclude that an employer must actually provide the physical evidence to the employee and not merely explain the impact of the evidence on the employment decision. According to Petitioner, due process requires pretrial discovery, including production of documents and indentification of witnesses. *See* Petition for Writ of Certiorari at 11, 14. *Loudermill* does not suggest such a reach and in fact *cautions*, as noted in the very sentence following the passage set out above, that to require "more" would "intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* For this reason, the federal courts in Kansas, and now the Kansas Supreme Court, have reviewed the Kansas statutory provisions which form the basis of CCCC's conduct in this case and concluded that these provisions, if met, pass constitutional muster under *Loudermill*. *See Peterson v. United School Dist. No. 418*, 724 F.Supp. 829 (D. Kan. 1989).

Apart from the fact that CCCC complied with a statutory scheme designed to protect constitutional rights, the independent facts of this case establish that Petitioner received all of the process due him under any standard, statutory and otherwise, and in fact received much more than "minimal" process.

Petitioner received "oral or written notice of the charges against him." On May 15, 1989, he received the Board's letter unequivocally expressing such intent.

Petitioner received itemized "explanation(s) of the employer's evidence." On June 6, 1989, Leo Dreiling of the Board read the following statement and list of nine reasons for nonrenewal of Dr. Kosik's contract:

> Dr. Kosik, I am now furnishing you with a written list of the reasons upon which the Board made its decisions to issue to you its written notice of intention not to renew your contract for the next school year. The reasons are as follows:
>
> 1. Conduct demonstrating lack of proper professional and personal respect towards staff and students causing resentment and offense.
>
> 2. Refusal to foster working relationships with college staff in an effort to enhance the overall learning atmosphere of the LRC and achieve harmony in the use of the LRC among students, staff and LRC personnel.
>
> 3. Rigid and inappropriately harsh enforcement of LRC rules causing resentment among staff and students and unnecessary inaccessibility to needed materials and equipment.
>
> 4. Public swearing and abusive conduct towards staff and students.
>
> 5. Inappropriate and offensive conduct which has alienated a number of college faculty members to a point that they avoid the use of the LRC, giving student assignments requiring use of the LRC and any contact whatsoever by the faculty or students with Dr. Kosik.
>
> 6. Inappropriate and offensive conduct towards students causing some students to be uncomfortable about or even to avoid using the LRC.

7. Offensive and inappropriate conduct resulting in the underutilization of the LRC to the detriment of the college, its faculty and students.

8. Termination of a support staff employee without the requisite administration approvals in violation of Board policies.

9. Termination of support staff employee knowingly in direct contradiction of administration intentions and desires.

This explanation was based upon evidence collected during Petitioner's six years of employment history, which included the formulation of "directives" sent by the Board to Petitioner in response to, *inter alia*, the petition of students calling for a review of Petitioner's appointment.

Finally, Petitioner was *twice* given "opportunities to respond" to the nine reasons. He took almost an hour for his presentation on June 6, 1989. Once Petitioner concluded this presentation, two of his assistants from the LRC testified on his behalf to the Board. Petitioner's response was partially effective since, after his presentation, the Board removed items 8 and 9 from the list of reasons for nonrenewal. Then, again, on June 9, 1989, Petitioner fortified his testimony with a three-page letter to the Board which contained Petitioner's concession that the first seven reasons had been neutralized by the testimony of his two assistants. Prior to the Board's final decision on June 16, 1989, the Board took a tour of the LRC. Following the tour, and after the benefit of Petitioner's oral and written responses, the Board voted not to renew Petitioner's contract.

When this case is viewed in tandem with other cases construing and applying the *Loudermill* standards, CCCC's conduct, and the process provided to the Petitioner, satisfies this Court's due process standards. For example, in *Powell v. Mikulecky*, 891 F.2d 1454 (10th Cir. 1989), the Tenth Circuit found that an informal confrontation between an employer and employee satisfied each of the *Loudermill* requirements. *Id.* at 1459. In reaching this result, the Tenth Circuit catalogued post-*Loudermill* cases which support the conclusion that due process requires only *"abbreviated"* pre-termination hearings. *Id.* at 1460.

Such a result was recently reached yet again by the Tenth Circuit in *Derstein v. State of Kansas*, 915 F.2d 1410 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 1391 (1991), when a former court services officer brought a civil rights action pursuant to 42 U.S.C. § 1983 against the state and district court judges involved in his discharge. The plaintiff in *Derstein* complained that his discharge violated his liberty and property interest without due process of law. After a bench trial, the district court held that the pre-termination proceeding violated Derstein's due process rights. The Tenth Circuit Court of Appeals concluded, however, that plaintiff was provided due process and reversed.

The parties in *Derstein* agreed that the plaintiff was a "tenured" employee. The plaintiff in *Derstein* was given a one-day notice to meet with a judge in chambers. At the meeting, the judge informed plaintiff *for the first time* that an employee sought to bring a sexual harassment suit against the state because of plaintiff's actions. The judge informed plaintiff that he would have ten days to resign

or he would be terminated. At the end of the ten days, the plaintiff in *Derstein* received a termination letter. The court in *Derstein* held that the pre-termination hearing with the judge in chambers satisfied the due process requirements of *Cleveland Board of Education v. Loudermill.* The court in *Derstein* reasoned:

> At the May 6 'pre-termination hearing,' Derstein was orally informed that defendants intended to discharge him because of complaints regarding a 'long standing' problem of his alleged verbal and sexual harassment. Further, Derstein was not terminated at the meeting but given ten (10) days to respond. This meeting provided Derstein all that was necessary under *Loudermill* notice of the charges, the nature of the allegations and an opportunity to respond. . . .
>
> *A pre-termination hearing was never intended as an adjudicative detailed proceeding.*

Id. at 1413 (Emphasis added.)

For these reasons and by virtue of the procedures set out in CCCC's Administrative Personnel Policies, commensurate with the standards of *Loudermill,* and in the spirit of simple fairness, Petitioner received his due process.

II. ANY FURTHER PROCEDURAL SAFEGUARDS – SUCH AS PROVIDING ACTUAL EVIDENTIARY MATERIAL TO THE EMPLOYEE OR INDENTIFYING ADVERSE WITNESSES – ARE NOT SUPPORTED BY THIS COURT'S DECISIONS OR THE POLICIES UNDERLYING THE DUE PROCESS CASES

As noted above, the form of the requisite pre-termination hearing takes its shape from a balancing of the competing interests. In *Loudermill,* the Court determined that due process required a *limited* pre-termination hearing – an informal opportunity to respond either orally or in writing as to why the proposed action should not take place. *Loudermill,* 470 U.S. 532. Only in the context of a welfare benefit has the Court demanded a more formal pre-termination hearing for the salient reason "that [the] termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Goldberg v. Kelly,* 397 U.S. 254, 264 (1970); *Cf. Barry v. Barchi,* 443 U.S. 55 (1979) (pre-termination opportunity to respond before suspension of license); *Mathews v. Eldridge,* 424 U.S. 319 (1976) (limited pre-termination procedure before withholding disability benefits); *Arnett v. Kennedy,* 416 U.S. 134 (1974) (partial pre-termination hearing sufficient before termination of public employment). *Loudermill,* therefore, is a consistent addition to the procedural due process analysis since it declares, quite cogently, that a public employee is entitled to an abbreviated pre-termination procedure consisting of notice and the opportunity to respond.

Loudermill is also consistent with the Court's prior opinions concerning public employment and due process. Almost three decades ago in *Arnett v. Kennedy,* the Court reviewed pre-termination procedures consisting of a pre-termination notice, an explanation of the employer's evidence, and an opportunity to be heard. *Arnett,* 416 U.S. at 137. In *Arnett,* Justice Powell distinguished an individual's interest in employment from that in a welfare benefit by stating:

> [T]he crucial factor [in the context of welfare benefits] – a factor not present in the case of . . . the discharged government employee . . . – is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. By contrast, a public employee may well have independent resources to overcome any temporary hardship, and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits.

Id. at 169 (Powell, J., concurring in part and concurring in the result in part) (citing *Goldberg,* 397 U.S. at 261).

This Court has repeatedly stated that not all situations calling for procedural safeguards call for the same kind of procedure: "[T]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interest involved and the nature of the subsequent proceedings." *See Boddie v. Connecticut,* 401 U.S. 371, 378 (1971). For this reason, Petitioner's selective reading and resulting reliance on *Brock v. Roadway Express, Inc.,* 481 U.S. 252 (1987), is misplaced.

Brock involved the procedural protections which are to be afforded to *an employer,* regulated by the federal government and directed by that government to rehire a formally discharged employee. In *Brock,* the Court concluded that "minimum due process for the employer *in the context presented* requires the following:

> ". . . [N]otice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses.

Id. at 264.

The *Brock* decision weighs, as it must, the important policy underlying a federal statute which protects employees who suffer retaliatory discharge because they file a complaint about a motor carrier's safety violation or refuse to operate an unsafe vehicle. *See* § 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 2305. In short, the federal statute protects "whistleblowers." In reviewing "what process is due" in the case of an *employer* directed by the government to rehire an employee, Justice Stevens notes:

> Cases dealing with the pre-termination procedures that must be made available to those deprived of employment, benefits or other forms of 'new property' are not necessarily controlling on the level of procedures required when the government exercises its classic police power to interfere with transactions and matters involving private parties.

Brock, 481 U.S. at 274, n. 2 (Stevens, J., concurring in part, dissenting in part). Stated conversely, *Brock* is not applicable to this case, which should be governed by the standards enunciated in *Loudermill*, discussed above.

Notwithstanding Justice Stevens' comments and even under the inapposite *Brock* standard, Petitioner received the due process described in *Brock*. As noted in detail above, Petitioner received written notice of the reasons of the Board's proposed action; Petitioner physically met with the Board to present an oral response; Petitioner submitted a written response; and, importantly, Petitioner presented "rebuttal" witnesses. Once again, to require more was specifically rejected by a majority of the Court:

> The presentation of the employer's witnesses . . need not be formal *and cross-examination of the employee's witnesses need not be afforded* . . .

Id. at 264 (opinion of Marshall, J., joined by Blackmun, J., Powell, J., and O'Connor, J.) (emphasis added); *see also Id.* at 271 (concurring and dissenting opinion of White, J., joined by Rehnquist, C.J., and Scalia, J.). Therefore, any suggestion that actual evidentiary materials or indentification of witnesses be provided as a part of the "process due" is not supportable.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[PLAINTIFF'S EXHIBIT 4A]

To: Dr. Frank P. Kosik
From: Dr. James P. Ihrig
Dated: April 21, 1987

DIRECTIVES

You are hereby given the following directives:

The following conditions shall be complied with and accomplished as soon as reasonably possible:*

1. You will submit all LRC policies immediately to the Administration for review, and comply with revisions made.

2. You will cooperate with college staff and students as necessary to enhance the overall learning atmosphere, and otherwise direct the LRC in such a manner as is needed to foster and achieve harmony in the use of the LRC among students, staff and LRC personnel.

3. You will at all times deal with college personnel, students, and other LRC users in a courteous and respectful manner.

4. You will seek acceptance of and compliance with LRC policies through polite diplomacy, rather than personal confrontation.

5. Those who may breach policies of the LRC shall nevertheless be treated with politeness, as appropriate for achieving compliance, but in a professional manner.

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* This clause was crossed out in the original; the language in italics was handwritten over this clause.

6. Under no circumstances will you use profane or derogatory language, or otherwise conduct yourself so as to emotionally injure or offend another in connection with your job-related responsibilities.

7. You will not discriminate against any user of the LRC on the basis of race, color, creed, sex or handicapped status.

If you fail to comply with the above directives, it will not be possible to maintain you as director of the LRC.

RECEIPT

The above was received by me on April 21, 1987.

/s/ Dr. Frank P. Kosik
Dr. Frank P. Kosik

[PLAINTIFF'S EXHIBIT 7]

ADMINISTRATOR'S MEETING WITH BOARD PURSUANT TO NOTICE OF NONRENEWAL

The Board of Trustees of Cloud County Community College is now sitting in executive session pursuant to a written request filed by Dr. Frank Kosik subsequent to a written notice of the Board's intention to not renew his contract with Cloud County Community College for the 1989-1990 school year. Neither the Board nor Dr. Kosik have the right to have counsel present.

Dr. Kosik, I am now furnishing you with a written list of the reasons upon which the Board made its decision to issue to you its written notice of intention not to renew your contract for the next school year. The reasons are as follows:

1. Conduct demonstrating lack of proper professional and personal respect towards staff and students causing resentment and offense.

2. Refusal to foster working relationships with college staff in an effort to enhance the overall learning atmosphere of the LRC and achieve harmony in the use of the LRC among students, staff and LRC personnel.

3. Rigid and inappropriately harsh enforcement of LRC rules causing resentment among staff and students and unnecessary inaccessibility to needed materials and equipment.

4. Public swearing and abusive conduct towards staff and students.

5. Inappropriate and offensive conduct which has alienated a number of college faculty members to a point

that they avoid the use of the LRC, giving student assignments requiring use of the LRC and any contact whatsoever by the faculty or students with Dr. Kosik.

6. Inappropriate and offensive conduct towards students causing some students to be uncomfortable about or even to avoid using the LRC.

7. Offensive and inappropriate conduct resulting in the underutilization of the LRC to the detriment of the college, its faculty and students.

8. Termination of a support staff employee without the requisite administration approvals in violation of Board policies.

9. Termination of support staff employee knowingly in direct contradiction of administration intentions and desires.

You are entitled to have an opportunity to respond to the above charges. You may either make an oral response at this time, or you may make your response in writing before the Board meets to reconsider its reasons and your responses. The Board will meet on June 15, 1989, to reconsider its reasons for nonrenewal of your contract and to make a final decision as to the matter. You will be notified of the Board's final decision within a few days thereafter.

Would you like to make a statement of response at this time, or would you prefer to respond in writing to the reasons?

[PLAINTIFF'S EXHIBIT 13]

[LOGO]
Cloud County Community College

2221 Campus Dr.
P.O. Box 1002
Concordia, KS 66901-1002
(913) 243-1435

June 9, 1989

Mr. Leo Dreiling
President of the CCCC Board of Trustees
1518 Highland Drive
Concordia, KS 66901

Dear Mr. Dreiling:

Now that I have had time to study and reflect on the "Reasons for Nonrenewal", I am doing what I said I would do in addition to my oral remarks, that is, I am submitting to you and to the Board some written remarks about them.

My initial reaction to the "Reasons" remains unchanged: they in no way constitute evidence and are merely tediously repetitious and totally unfounded malevolent fabrications and willful misrepresentations.

I will not deal with the "Reasons" 1 to 7. They have been amply dealt with by Mrs. Johnson and Mrs. Parker. I will concentrate on the "Reasons" 8 and 9.

The Administration, meaning Drs. Ihrig and Douglass, have, no doubt knowingly and malevolently purposefully, misrepresented what really happened. They lie when they say that I have terminated Mrs. Whitney. (Please see the attached copy of my memo of June 1 to Mr. Warner for my exact wording.) I well know that the

authority to employ and terminate belongs to the employer, the Board of Trustees. However, being LRC Director I have the authority to hire and dismiss, for a cause, any member of the LRC support staff. Even though Dr. Douglass has all along insisted that Mrs. Whitney, an LRC Assistant, is "protected" meaning that she is exempt from the test of performance (which is the legal prerequisite of lawful pay) and cannot, therefore, be dismissed, I dismissed her for a well-documented good cause – non-performance. Dr. Douglass explicitely [sic] stated that I have the authority to dismiss any member of the LRC support staff except Mrs. Whitney. I categorically reject the implication that Mrs. Whitney enjoys a special administrative and legal status. According to the Support Staff Policies, all LRC support staffers have equal administrative and legal status and thus all are subject to the test of performance.

My position of LRC Director confers upon me the authority and the responsibility to evaluate the LRC support staffers and to approve their time-sheets for wage payments just as it confers upon me the authority and the responsibility to develop and maintain – to hire and to dismiss – the LRC support staff. There is a simple yet profound difference between dismissal and termination: termination means the ending of employment with CCCC while dismissal means the ending of membership on the LRC support staff. Thus a dismissed LRC support staffer remains an employee of CCCC and may be either reassigned or terminated by the competent authorities – the Business Manager and the Board of Trustees. It is obvious that by dismissing Mrs. Whitney from the LRC support

staff I have not and could not have violated any Board policies.

So what is left of the laundry list is "Reason" 9.

I have already established that what took place was a dismissal rather than termination. Rewritten accordingly, "Reason" 9 reads: "Dismissal of support staff employee knowingly in direct contradiction of administration /sic/ intentions and desires." Now, a direct contradiction signifies the opposite. The opposite of dismissal is retention. Thus what the "Reason" 9 says is that the Administration desires and intends to retain Mrs. Whitney in her LRC position. But Mrs. Whitney has been found unfit fot [sic] that position and has completely failed the test of performance. Consequently, the Administration's intention to retain her in her LRC position is an intention to continue to violate the laws governing public employment and the disbursement of public monies. It is, in fact, a criminal intention. This corrupt Administration is asking your approval of this intention and your cooperation in carrying it out.

In order to carry it out, the Administration seeks my termination. It seeks my termination not because of proven nonperformance, but because I blew the whistle on the corruption involved in Mrs. Whitney's presence on the LRC staff. The Administration assumes that by getting rid of me they, Drs. Ihrig and Douglass, will be able to carry on as usually [sic] – disregarding all laws, collegiate, public and moral, and shirking all accountability.

Naturally, I would like to know as, I am sure, you and the Board would like to know why the Administration is doing all this. There must be reasons for their actions. But

these reasons cannot have anything to do with the College. Mrs. Whitney has not been an asset but rather a liability to this College. They could only be private reasons. The Administration has expended college funds and intends to continue to expend them for reasons that have nothing to do with the good of the College. Such use of public monies constitutes malfeasance and malfeasance is a felony.

Why would Drs. Ihrig and Douglass pursue such reckless, irresponsible and, ultimately, self-destructive course of action? It seems to me that the Board should investigate or have investigated the reasons for the Administration's bizarre behavior.

We are really looking forward to your and the Board's get-acquainted visit to our Center.

Sincerely,

/s/ Dr. Frank P. Kosik
Dr. Frank P. Kosik
LRC Director

cc/ Mr. Frank Brunell
Mr. Robert C. Champlin
Mr. Keith Christensen
Mr. Lloyd Erickson
Mr. Dan Farha

Enclosures: "Reasons for Nonrenewal."
My June 1 memo to Mr. Warner.